

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY
CIVIL ACTION 16-CV-4966-KM

SUZANN MOORE, et al	:	TRANSCRIPT OF PROCEEDINGS
	:	
Plaintiffs,	:	ORDER TO SHOW CAUSE
	:	
-vs-	:	Pages 1 - 34
	:	
SAMSUNG ELECTRONICS AMERICA, INC., et al	:	
	:	
Defendants.	:	

Newark, New Jersey
DATE: October 4, 2016

B E F O R E: HONORABLE KEVIN McNULTY
UNITED STATES DISTRICT JUDGE

11 APPAREANCES:

12 CARELLA BYRNE
13 BY: JAMES E. CECCHI, ESQ.
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15 Attorney for the Plaintiff

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Pursuant to Section 753 Title 28 United States Code, the following transcript is certified to be an accurate record as taken stenographically in the above entitled proceedings.

M/Mollie Ann Giordano
MOLLIE ANN GIORDANO
Certified Court Reporter
(973-220-9465)

1 A P P E A R A N C E S - continued
2

3 GIBBONS, P.C.
4 BY: MICHAEL McDONALD, ESQ.
5 Attorney for Defendant

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7 KRISTIN L. BRYAN, ESQ.
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1 THE COURT: Okay we are here on an application for
2 emergent injunctive relief in Moore versus Samsung, civil
3 action number 16-4966. Before going any further, let's have
4 appearances of counsels.

5 MR. CECCHI: Good afternoon, your Honor. James Cecchi
6 Carella Byrne on behalf of the plaintiffs. With me is Jason
7 Lichtman and Scott Starr from the firm of Starr Austen & Miller
8 from Indiana.

9 MR. McDONALD: Michael McDonald from Gibbons PC on
10 behalf of Samsung.

11 MR. OLISS: Phil Oliss his on behalf of Samsung
12 Electronics America. With me is Kristin Bryan also.

13 THE COURT: Okay.

14 Okay, we got some pro hacs hanging out there, before
15 we get started.

16 MR. CECCHI: We do, your Honor. Mr. Starr has a pro
17 hac pending. Mr. Spragens from the Lieff Cabraser firm in
18 Nashville.

19 THE COURT: And your side as well. Anybody have any
20 objection either way?

21 MR. McDONALD: No, your Honor.

22 THE COURT: Those will be granted. But don't all talk
23 at once. Okay?

24 I have an application for all sorts of relief,
25 including what I'm calling practically a product recall on a

1 TRO basis. Remarkable in my experience, but I'll hear you.
2 Talk to me about -- well, who will be speaking on the
3 plaintiffs' side.

4 MR. CECCHI: With your permission, Mr. Lichtman will
5 take the laboring order on the presentation. To the extent he
6 doesn't cover everything, I'll fill in on expedited discovery.

7 THE COURT: Tell me a little bit why it's emergency
8 and why you're entitled to it.

9 MR. LICHTMAN: Your Honor, may I approach?

10 THE COURT: Yes. I'm not fussy, is all I'm saying.

11 MR. LICHTMAN: May it please the Court, you started
12 off on the obligation this is a remarkable application for
13 relief. Respectfully, we would point out this is a very
14 remarkable case. We stand before the Court two weeks ago. We
15 sent counsel for Samsung, which is routine. We asked them not
16 to destroy evidence moving forward in this case. Samsung
17 responded to that e-mail, and we've attached that e-mail by
18 telling us to get a court order, and we are here seeking that
19 order. And we would respectfully --

20 THE COURT: That's fine. When litigation is pending,
21 you know, certain duties arise. We all know what they are.
22 And they're required to observe them, and are they required to
23 reassure you.

24 MR. LICHTMAN: They are in this case, your Honor,
25 because we have information that Samsung in this case, on at

1 least one occasion where they personally destroyed it, or
2 permitted a washing machine to be destroyed. Miss Moore's
3 washer was taken away, and we've submitted evidence that that
4 washer was shredded.

5 THE COURT: Taken away by whom? And shredded by whom?

6 MR. LICHTMAN: She arranged for the washer to be taken
7 away. And if you forgive me, your Honor, I'll go to my
8 colleagues with the details how it was taken away from her.
9 The bottom line is, she contacted her authorized retailer,
10 which is Sears, and so Sears made the -- Sears is the one who
11 made those arrangements. And so in that circumstance --

12 THE COURT: So she gives the washer back to Sears, and
13 then what happens to it?

14 MR. LICHTMAN: And then apparently the washer is
15 shredded.

16 THE COURT: Shredded by whom? Sears? Samsung? Who?

17 MR. LICHTMAN: Sears took it to a third party, a
18 facility in Ohio and had it shredded. That's the best
19 information we have at the moment your Honor.

20 MR. CECCHI: That's correct, Judge.

21 MR. LICHTMAN: And under those circumstances, and we
22 want to be clear --

23 THE COURT: We have one of those washers shredders,
24 okay.

25 MR. LICHTMAN: And we want to be -- so under those

1 circumstances, we thought -- Mr. Cecchi and I were not involved
2 in the case in Indiana. And under those circumstances, we
3 thought it prudent, let's get an assurance from the defendants
4 that they're not going to permit this to happen again.

5 THE COURT: Okay. And how long ago did that happen?

6 MR. LICHTMAN: I sent that e-mail approximately two
7 weeks ago, and it was a follow-up on a conversation that I had
8 approximately three weeks ago.

9 THE COURT: And when did the destruction of the washer
10 occur?

11 MR. LICHTMAN: The washer was destroyed in January.

12 THE COURT: In January. And you learned about it
13 when?

14 MR. LICHTMAN: I learned about it when I joined this
15 case.

16 THE COURT: I didn't mean you, personally.

17 MR. SPRAGENS: I think we learned about it in March,
18 your Honor.

19 THE COURT: Okay. So where's the fire? What happens
20 in January, you learned about it in March.

21 MR. LICHTMAN: The fire comes about when we say please
22 assure us -- again, this seemed to us like a very routine
23 e-mail that we sent Samsung. Please assure us that you won't
24 destroy washers. And their response was no. And, your Honor,
25 I would point to page 12 in their brief, you know, you've made

1 the observation, well, defendants have an obligation to
2 preserve evidence. Page 12 in the brief they say something
3 very disturbing. They talk about the expense of reserving,
4 it's very expensive to store washing machines. And that
5 certainly gives rise to an inference that Samsung is not
6 preserving evidence in this cases. And if you read Samsung's
7 brief, at no point in time -- they say we'll comply with the
8 discovery obligations, parenthetically as we see fit. At no
9 point in time, they say we have not knowingly destroyed
10 washers, at no time do they say we won't destroy washers in the
11 future. Instead, they say it's very expensive store washers.

12 THE COURT: Oh. And we'll get to you. But I agree
13 with you, that the assurances are somewhat generic, that
14 they're aware of compliance with obligations in this
15 litigation. That's not exactly factual, I agree with you, but
16 we'll get to that. Okay.

17 But I get it, that you're nervous about it. But what
18 is the efficacy of an order telling them: Hey, remember those
19 obligations you have, well, you really have them. What does
20 that accomplish?

21 MR. LICHTMAN: Well, the courts have issued these
22 types of orders when in particular it appears that the party,
23 typically the defendant, the party that's the target of the
24 order, has a different interpretation of their ethical
25 obligations under the discovery rules, than their ethical

1 obligations under the discovery rules. And we would stress to
2 your Honor, if you look at the declarations that I submitted,
3 that the defendant submitted, respectfully, defendants have a
4 different memory of the conversation than we have. Had
5 defendants ever simply said to us, in any terms at all, we are
6 not destroying washers, we won't destroy washers, we would not
7 be here seeking the evidence preservation order. We would have
8 our other pending motions. The only reason we have the
9 temporary restraining order is to get them to stop destroying
10 washing machines. That's the only purpose of the TRO.

11 THE COURT: Okay. But, I mean, you get my point.
12 What I'm trying to figure out here is which of these two
13 situations do we have here. There are some cases in which when
14 counsel calls his or her and says: Please acknowledge that
15 today is Tuesday. And that person's boss says: We're not
16 giving them nothing, no. That's a case of unpleasantness among
17 counsel or lack of cooperation among counsel. If somebody is
18 really indicating, however, if situation 2 is you call them up
19 and say: These washers are important evidence, please
20 acknowledge you're not destroying them. And they say: No, we
21 are destroying them, that's something else. We're somewhere in
22 the middle, probably. But I'm trying to figure out if there's
23 really an issue here or not. So do you have anything else
24 other than Sears delivery of the washer to whoever destroyed
25 it?

1 MR. LICHTMAN: Your Honor, we would also point --
2 their case stands very strongly for the proposition that this
3 Court is entitled to take into consideration who the defendant
4 in this case is. And just because it's an atypical case, this
5 is not a defendant with a good history of preserving evidence.
6 Quite the opposite. The Apple vs. Samsung Court condemned this
7 defendant in very severe terms for fundamentally, whether you
8 call it destroy it or failing -- expoliating evidence, it was
9 exactly the same thing. And Judge Martini condemned this
10 defendant for it. This Court is entitled to take note of who
11 the defendant is. To some degree, I don't know that this has
12 to be complicated, which is precisely what my reaction to what
13 Mr. Oliss said in the first instance.

25 This is a case about defective, or even worse washers,

1 and he's asking you to say: Oh, we're not going to destroy
2 that. That doesn't seem so unreasonable to me. What's the
3 problem?

4 MR. McDONALD: Samsung is not destroying washers at
5 issue in this litigation.

6 THE COURT: Why doesn't the Moore washer count?

7 MR. McDONALD: Samsung didn't destroy the Moore
8 washer.

9 THE COURT: Your retailer did?

10 MR. McDONALD: Evidently. It's important to note
11 that if you hear what Mr. Lichtman said, based on the
12 representation of counsel that the destruction occurred prior
13 to the filing of the lawsuit, at which time there would have
14 been no obligation on the part of Samsung to preserve evidence,
15 it wasn't in the prevent or control.

16 THE COURT: Would Samsung be willing to circulate the
17 equivalent, not about washing machines, would they be willing
18 to circulate to their retailers the equivalent of a: If you
19 get washers that seems to have this problem, please don't
20 destroy that, absent authorization?

21 MR. McDONALD: Your Honor, I don't know. That
22 question has never been asked. I don't know what authority
23 they might have that their vendor agreement provides. I guess
24 I'm not comfortable answering that question. What I can tell
25 you, since it began back in March of this year, the company has

1 been advised with respect to its obligations, which it
2 thoroughly understands that litigation holds are in place. And
3 that the notion of destruction of evidence is just misplaced.
4 And I'd have to feign a little bit of disagreement with Mr.
5 Lichtman's comments with respect to our communications leading
6 up to today. Mr. Lichtman and the attorneys at the Starr law
7 firm have made allegations that Samsung has been destroying
8 evidence. I asked on multiple occasions what the basis is for
9 that. I had no basis to believe that was true. I had no
10 knowledge, whatsoever. My understanding was the company,
11 having spoken to people at the company, was fully complying
12 with the discovery obligations. And I have never seen any
13 evidence such as it is until the filing of the show cause
14 application. The notion simply that we refused to stop
15 destroying washing machines, the company is not destroying
16 washing machines. And the other is, the focus of the
17 conversation was, if you believe that there goes some
18 violation, and I said directly, if you believe there's some
19 violation of my client's duty to preserve evidence, please tell
20 me, because this isn't something I want to find out later until
21 the application is filed.

22 THE COURT: Here's what I want to know, I guess. That
23 is, I can think of a hundred ways in which that statement could
24 be technically true, washers would be in the process of being
25 destroyed. For example, is when one of these washers goes bad,

1 does it get sent to Samsung or does it get sent back to Sears,
2 or whoever the person is that bought it?

3 MR. McDONALD: It may or may not. Samsung doesn't
4 have complete control over every washing machine returned to a
5 retailer or repaired, so I can't make a representation that
6 Samsung necessarily would be in possession of every washing
7 machine that malfunctioned in the nature that we were talking
8 about in this case. To the extent that Samsung does have
9 possession and custody and control of washers that have
10 experienced malfunction, of course we disagree with the
11 calculation. To the extent that Samsung has that evidence, it
12 is being preserved.

13 THE COURT: Well, to plaintiffs, I have a rhetorical
14 question, which is, given that representation, if it turns out
15 washers are being destroyed, wouldn't that be like the greatest
16 thing that ever happened to a plaintiff's attorney?

17 MR. CECCHI: For the plaintiffs, Jim Cecchi. What
18 we've heard from my perspective is rather remarkable. The
19 Moore case was filed six months ago. The other case was
20 exposed. They knew all about it. Their duty to preserve
21 evidence at the latest arose at that point in time. They can't
22 confirm that they sent a lit hold, that their retailers have
23 gotten the lit hold. You ask Mr. Lichtman about, where is this
24 duty to let us know rise. We have a right to know --

25 THE COURT: I'll get back to you.

1 MR. CECCHI: But it wouldn't be -- to answer your
2 question.

5 MR. McDONALD: Your Honor, I would just reiterate the
6 washing machine that Mr. Cecchi is referring to is in
7 possession and control of the plaintiff, who claims, says in
8 her affidavit that she contacted Samsung and she was given a
9 refund, prelitigation, and arranged through Sears, or Sears
10 Center, to remove the washing machine. And beyond that, we
11 have double, triple hearsay after that purporting what happened
12 to it. It was in the custody of the plaintiff. To the extent
13 there has been any failure to preserve evidence, and I'm not
14 sure that any obligation -- to the extent there's been a
15 failure to preserve evidence --

16 THE COURT: Okay. But given that, look what's likely
17 to happen. A consumer product goes wrong. The plaintiff is
18 not going to keep -- by the way, I'm not jumping ahead of
19 myself. I'm not assuming that the products are defective. If
20 there's a defective product and it turns into a pile of scrap
21 metal and bolts, the plaintiff is not going to keep it in the
22 plaintiff's whose. The plaintiff is going to keep it back in
23 the store and say: Hey, this thing isn't working the way it's
24 supposed to. We're not really talking about the plaintiff
25 preserving evidence. The plaintiff gave it back to the person

1 the plaintiff bought it from.

2 Now, what happens then, isn't there a way we can do
3 the equivalent of a litigation hold in which your retailers,
4 when they receive a complaint, and when they get back a washer
5 of this kind, we'll hang onto it. Or put it in storage. Or
6 tell you so you can put it in storage. You, Samsung, not you
7 personally. Why can not that be done?

8 MR. McDONALD: Your Honor, I don't know, the question
9 has never been asked before. It may be something that can be
10 done, and it maybe somebody that is being done. The way this
11 whole issue has been framed, is we have evidence that Samsung
12 is destroying evidence that we want you to stop. And our
13 response has been, what I have had: We're aware of nothing of
14 the kind. Samsung is complying with discovery obligations.
15 And please tell us what you're talking about.

16 I'm not trying to avoid your question, your Honor. I
17 understand why that's a reasonable suggestion. I'm not
18 prepared to speak to the ability of the company to do that, but
19 I'd be happy to have that conversation.

20 THE COURT: How long would it take for you to be able
21 to speak to that?

22 MR. McDONALD: Certainly in light of today's events,
23 I'd be happy to contact the clients as soon as I can. I can
24 make phone calls this afternoon.

25 THE COURT: I mean, look, all I really want to know is

1 that -- I don't want the company because, you know, obviously
2 they're not, people who work at Samsung are not selling
3 appliances to people. They're not at the level where the
4 appliance is when it goes wrong. All I want to know is Samsung
5 is not closing its eyes and saying: We're not destroying
6 anything. Sears is. That's not quite a satisfactory answer.
7 And I just want to know, assuming that washers have problems
8 and are being returned to anybody, you're in a relationship
9 with your seller, that they can be put aside for a while. It
10 doesn't sound like an unreasonable request. And if there is
11 evidence of this thing one way or the other, either the washers
12 don't have a defect or they do, it's going to be in the
13 washers. So I think it's in everyone's interest that if there
14 is a defect, or claim of a defect, that the machine that
15 there's a claim about be held aside for a while.

16 MR. McDONALD: Your Honor, I think that sounds
17 reasonable. That hasn't come up in the conversation before,
18 I'd like to talk to the client about it.

19 THE COURT: That's fair. You don't have to commit on
20 your feet here. Obviously, you have to talk to your client.
21 There may be reasons.

22 MR. McDONALD: Your Honor, if I can say one thing that
23 comes to mind. I think one concern might be the notion of a
24 guarantee that Samsung will be able to capture every instance
25 where there will be a complaint of this kind. It's probably

1 not something the company will be able to do in the rare
2 instance of the failure in the nature described so, you know, I
3 just put that out there.

4 If I can return to one thing, the point about the
5 washing machine being in the possession of the defendant when
6 it was destroyed or shortly before. It was not to suggest a
7 violation on the part of the plaintiff. I think it was
8 rhetorical.

9 THE COURT: I wasn't taking it that way. I was
10 saying, look, that's at the other end of the distribution chain
11 from us, and I get that. Okay. Well, if this can be handled
12 on the phone, I'd appreciate that. If you need a little more
13 time, I certainly can give you that. It could be a large
14 undertaking. I don't know how many washing machines we're
15 talking about, or how many complaints we're talking about. But
16 if it's -- well, does anybody know how many washing machines
17 we're talking about?

18 MR. LICHTMAN: Samsung, your Honor. Samsung recently,
19 it's a little tough to find, Samsung recently added as part of
20 its website people can put in the model number of an infected
21 washer. Plaintiffs would conclude from this, that Samsung
22 knows how many washers would come up as part of the washers
23 that they've sold.

24 THE COURT: There's a few moving parts between one and
25 the other, and I see what you're saying. But you can't --

1 there's no straight line between people who plug in their model
2 number and number of defective washers. So that that's not
3 really it. I just want to -- a ballpark. That is, if I'm
4 asking for storage of a million washers, if I'm asking for
5 storage of a hundred washers, that's clearly reasonable. I
6 want to know ballpark what we're talking about, if anybody
7 knows.

8 MR. CECCHI: Your Honor, we had been contacted by 18
9 people. Again, we're not -- people have called us and say that
10 their washers have blown up. We, as part of our complaint,
11 found approximately, a little more than 20 people who said that
12 their washers had blown up. And, again, these aren't final
13 numbers, or people who we found by Googling. So it's not
14 scientific evidence. We certainly hope we're not talking about
15 hundreds of washers that have blown up.

16 THE COURT: I have no idea.

17 MR. LICHTMAN: That would be extremely troubling,
18 again. Samsung should know this, Judge, as Miss Moore called
19 Samsung the moment her washer blew up. These people do
20 ultimately call Samsung.

21 THE COURT: Possible. Or they may call Sears or Home
22 Depot, or whoever.

23 MR. LICHTMAN: We do know that the three plaintiffs
24 called Samsung.

25 THE COURT: Okay.

1 MR. McDONALD: Your Honor, the short answer is, I
2 don't know. And you know we're happy to have the conversation
3 about that as well. I think part of the trouble that we run
4 into is this sort of theatrical characterization that the
5 alleged defect has explosions and so we have to kind of get
6 past that. I think we have some idea of what the nature of the
7 alleged defect is, and the client has been preserving evidence
8 that comes to it. It's no secret that there have been some
9 involvement with the CPSE that Samsung is cooperating in. And
10 so there's every reason to believe that there's no game being
11 played here, and there's no allowing vendors to destroy it so
12 that Samsung can deny that it did. That's not happening. I
13 don't have numbers for you.

14 THE COURT: Okay. Alright. Here's what I'm going to
15 ask you to do. I'm going to ask you to at least get on the
16 phone this afternoon with your client. I'm not saying they can
17 turn on a dime, or they can figure out in a half hour what's
18 feasible, and whether it's feasible. But basically I want this
19 to happen on two fronts. Number one, I want counsel to get
20 together and figure out what could reasonable work here. That
21 is in a products liability case, look, it is never the case
22 that you get basically every single defective product and
23 inspect it. You look at some of them, you figure out what the
24 defect is, you look at the sample. Again, depending on the
25 numbers here, and we don't know what the numbers are, it's a

1 little crazy to say we have to stockpile every single washer.
2 That is an awful lot to ask. And I've never seen it in other
3 products liability cases that you physically have to have every
4 single defective product under one roof to look at. It seems
5 to me counsel ought to be able to work something out in terms
6 of getting access to a reasonable number of these, you know,
7 physical items for inspection. I mean, isn't that going to
8 happen? But in the meanwhile, what would be a reasonable thing
9 to ask Samsung to do? I think in order to ensure that you have
10 enough washers to look at when discovery happens here, what
11 would be reasonable? What could Samsung do? What could they
12 do to have ten, or fifteen, or whatever you think you need to
13 look at there in the order discovery process that's going to go
14 on in this case, you can have a look at it. I'm not trying to
15 lay an expoliation trap for you, and I don't want to do that.
16 I want counsel to get together and figure out what could be
17 reasonable. So there's a reasonable obligation on Samsung and
18 not a gotcha expoliation demand. And if it isn't then, you
19 know, we're all going to forget about the underlying claims and
20 try an expoliation case. That's not going to happen. I'm
21 going to ensure that that doesn't happen. So why don't you
22 talk a little bit. And once you talk, maybe make a phone call,
23 and tell me where you are after that. I'll be around all
24 afternoon. But, the -- anyway, that's as far as we can get at
25 the moment on that.

1 What else do we have to deal with today?

2 MR. CECCHI: Let's follow your suggestion. That's
3 absolutely reasonable. And what the plaintiffs would want, a
4 meet and confer, so we can note that a representative sample
5 that is being conferred, and we can get to a reasonable number
6 so we can come back to the Court with an analysis on what's
7 going on there. It segues into another issue under Rule 26
8 which we've talked about in our papers, which is other types of
9 preservation that should be undertaken right now in this case,
10 and your Honor talked about expoliation

11 THE COURT: Let's ping-pong back to them, and I'll
12 call you again on this next issue.

13 MR. CECCHI: Our feeling, and believe it would be in
14 the context of the meet and confer, about getting to a
15 reasonable preservation on the physical evidence. And I agree
16 with your Honor a hundred percent, we want to try the design
17 defect case and not the expoliation cases. That's why, in many
18 cases, defendants welcome -- they give them parameters, and
19 then what they have to do, and this expoliation trap is not set
20 I would suggest under our local rule which says you have to
21 meet and confer, about E discovery and E data to come up with a
22 defective, what they're destroying and what they're not
23 destroying, that that's critical as well.

24 THE COURT: Alright. This isn't TRO material. You're
25 going to do that at your Rule 16 conference.

1 MR. CECCHI: I think it segues right -- we're going to
2 come back to your Honor on the PI. It protects them as much as
3 it protects us. We have that meet and confer, our local rule
4 requires it, that we have that meet and confer as soon as
5 practicable.

6 THE COURT: And so you shall. But I'm not going to
7 deal with our -- you're going to figure out what those
8 parameters are, and you're going to work it out with the
9 Magistrate Judge. That's not injunctive relief material as far
10 as I'm concerned. I'm not saying your concerns won't be
11 addressed, I'm saying they'll be addressed in a different
12 forum.

13 What else do we have to address today?

14 MR. LICHTMAN: We have two other issues, and one is
15 very succinct, which leads into the expedited discovery
16 conversation which Mr. Cecchi will handle for us. One is
17 plaintiffs' request for a preliminary injunction we ask. After
18 expedited discovery, we've asked for injunctive relief warning
19 the people who own these washing machines that -- and, again,
20 we're -- our specific request will be determined by discovery,
21 warning people not to stand right next to them while they're in
22 use. And Samsung addressed this in their papers and so we'd
23 just like to respond.

24 It does dovetail, and the preliminary injunction
25 hearing would not be for a few months, it dovetails why

1 expedited discovery is. Samsung's first argument is the Court
2 had no power to order Samsung to issue a warning. Samsung is
3 completely wrong under Rule 23D. Page 12 of our brief goes
4 through a number of case for the proposition that this Court
5 has broad power to issue orders governing communication with
6 absent class members. Samsung's brief never engages those
7 cases or Rule 23D.

8 And we would also point the Court --

9 THE COURT: Yeah, but on day one, when there's not
10 even a class.

11 MR. LICHTMAN: That's absolutely, your Honor. The
12 Court has the power to immediately issue orders, particularly
13 here where we have a safety issue, and, again, this would
14 dovetail to Mr. Cecchi's conversation. This is one of the
15 reasons we need expedited discovery. Part of the discovery we
16 just had is how many are blowing up. And this is one of the
17 reasons we need expedited discovery to prove to the Court that
18 there's a safety issue warranting this type of immediate
19 warning.

20 THE COURT: And if it is a safety issue, why is the
21 CPSC not on this? I was exaggerating for an effect, I suppose.
22 You're asking me for a product recall, aren't you kind of? Why
23 is it that I should be sending warnings to consumers?

24 MR. LICHTMAN: So, your Honor has asked two questions.
25 Let me answer the first. Isn't the CPSC on this? And the

1 second is why should I be sending warnings?

2 Your first question is, what is the suit? We were
3 very glad to see that after we filed this lawsuit, that the
4 Consumer Product Safety Commission has become involved. We do
5 not know the extent of their involvement, but unfortunately the
6 Government's involvement is not necessarily as fast as private
7 party involvement. The CPSC does have a warning on the
8 website. It's awfully tough to find. It's certainly better
9 than nothing. It is not the same as clear effective warnings
10 to protect the class.

11 To your other question, which goes, does the Court
12 have the power to issue warnings? The answer is, it really
13 depends what expedited discovery shows. We would point to the
14 Court to the Saw Horse case, 2013, that expedited discovery is
15 appropriate when plaintiffs are seeking this type of injunctive
16 relief.

17 Your Honor, I can't prove to you without that limited
18 discovery that we've asked for that warnings is appropriate.
19 But what we can say is that this Court unquestionably has the
20 power that, if we prove that these machines are dangerous, this
21 Court has the power to order Samsung to warn people. It is not
22 the type of thing that normally comes up. Normally we would be
23 cooperating. Normally we would be engaged in a dialogue with
24 Samsung. They have totally refused to talk to us.

25 MR. McDONALD: That's absolutely untrue, your Honor.

1 THE COURT: Listen, I don't want to get into that.
2 I'm not going to start paraphrasing phone calls between
3 counsel, I'm just not.

4 MR. LICHTMAN: Yes, your Honor.

5 THE COURT: Okay.

6 MR. LICHTMAN: So, your Honor, the bottom line here is
7 that we're not here to get an injunction today. The injunction
8 was brief, and it is relevant only to the extent that it
9 touches on whether expedited discovery here is appropriate.
10 It's not a question of -- we are not required to prove that the
11 injunction has merit today. And in fact we would absolutely
12 admit that right now we cannot show that we are more likely to
13 succeed than not. This is why expedited discovery is
14 appropriate. And I'll turn it over to Mr. Cecchi --

15 THE COURT: How about if I order you expedited
16 discovery and I send out a warning to consumers and they win
17 their motion to dismiss?

18 MR. LICHTMAN: The expedited discovery would --
19 presumably the motion to dismiss would be handled at least
20 either contemporaneous or prior to the December preliminary
21 injunction hearing. We don't need it immediately, but
22 plaintiff's are required under the rules to post a bond. If
23 the warning is sent out and Samsung wins, we have to post a
24 bond that covers a cost to Samsung.

25 THE COURT: And what kind of bond would cover their

1 damage from sending out a warning to consumers, "don't stand
2 next to your washing machine"? What kind of bond?

3 MR. LICHTMAN: The cost of notice.

4 THE COURT: The cost of notice.

5 MR. LICHTMAN: That question is presupposing that
6 maybe these washing machines don't blow themselves apart.
7 That's why we'd like expedited discovery, so we can prove to
8 the Court that this is in fact what's going on. The only way
9 we can get expedited discovery, there we are likely to prevail.

10 If your Honor is uncomfortable with this type of --
11 there's no reason why we can't simply move on an expedited
12 track. This is not a normal situation. We don't have a washer
13 that simply -- that plaintiffs allege just doesn't function
14 exactly the way it intends. We have a washer that blows apart
15 in plaintiffs' homes, and Samsung has characterized this as
16 dramatic. We've included pictures with our complaint. People
17 describe literally like a bomb going off. These things spin at
18 1,100 revolutions per minute. So this is a very serious issue.
19 This is not a typical situation.

20 THE COURT: Alright.

21 MR. LICHTMAN: And with the Court's permission -- I'm
22 sorry, I was going to turn it over to Mr. Cecchi.

23 THE COURT: Done, okay.

24 Your turn.

25 MR. McDONALD: Your Honor, this is very much a typical

1 situation. This is very much a garden variety consumer class
2 action. This is a consumer class action in which not all of
3 the defendants have even been served, in which the pleadings
4 are not closed. I've had several conversations with Mr.
5 Lichtman over the last several months, and one of the things I
6 told them, they've agreed to the extension that we intend to
7 file the motion to dismiss all the claims in this case. We are
8 going to do that. We think it's meritorious. We think the
9 cart is way ahead of the horse here in terms of talking about
10 the liability in advance of even having those issues addressed.
11 There is a process for handling a case like this. It would --
12 it happens all the time, and there's nothing particularly
13 special about this case, so there certainly is not --

14 THE COURT: Let me give you a hard time for a minute.
15 That is, when we talk about getting to the merits ahead of
16 time, that's what you always do in the preliminary injunction.
17 Isn't that what we always do, likelihood of succeed?

18 MR. McDONALD: You don't have a --

19 THE COURT: Likelihood of succeed.

20 MR. McDONALD: But, your Honor, the relief that they
21 seek through the preliminary injunction order that they seek is
22 a determination of liability and verification of their theory
23 of the case, such that this request warning would issue. This
24 is not -- expedited discovery arises with respect to the
25 unserved defendant. If they didn't, is the hold, it's

1 internally inconsistent, when they actually want to have
2 documents and other evidence produced. But settling that a
3 side, it goes to the whole case. Expedited discovery,
4 discovery for a specific purpose, it's an attempt to jump start
5 or bypass the process. It's going to be directed in part,
6 naturally the named plaintiffs, there is no class
7 representation in this case. So the notion that there's a
8 class that can be given warning jumps so far ahead of the
9 process. That it's not even conceivable, you can not even have
10 some sort of undefined class on the basis of this litigation
11 where the adequacy of these plaintiffs to serve as class
12 representatives will not be tested at some time. There's a lot
13 of supposition going on here.

14 I'm struck by Mr. Lichtman's comment, that these
15 washing machines don't explode. I submit that that's precisely
16 what the Court, this entire proceeding from the plaintiffs'
17 perspective is marked by the plaintiffs to shift the burden of
18 proof. Instead of seeking a TRO, you seek a motion, which is
19 totally improper. And now we're being presented with arguments
20 that suggest that Samsung has, as a preliminary matter, an
21 obligation to present evidence to have a hearing to demonstrate
22 that its washing machines do not explode. That's not the
23 purpose.

24 THE COURT: Alright. Let me ask, is there any -- and
25 I'll ask both sides, is there evidence thus far that anyone has

1 been physically harmed?

2 MR. CECCHI: Yes, your Honor.

3 THE COURT: What is the evidence?

4 MR. CECCHI: There's a situation in California where
5 the lady's jaw was broken. What's the name of that plaintiff?
6 Simone. The complaint is part of the record.

7 THE COURT: I hear --

8 MR. McDONALD: I'm sorry, I apologize. It was injured
9 by the washer, individual action was taken. It raises another
10 issue which is hardly news to the extent I think that that case
11 is hardly relevant, that they've been aware of it for years,
12 certainly before this action was even commenced, a notion that
13 that gives rise to some sort of urgency.

14 THE COURT: Alright.

15 MR. CECCHI: Judge, very briefly on the expedited
16 discovery, just a few points.

17 THE COURT: I'll hear you on it.

18 MR. CECCHI: Yes. Thank you, Judge.

19 We are not trying to shift the burden to Samsung on
20 the preliminary injunction. We have the burden. And as your
21 Honor points out --

22 THE COURT: You're trying to jump the line on
23 discovery, and that's the reason --

24 MR. CECCHI: And I totally agree with your Honor.

25 THE COURT: Even though they know they're not going to

1 get it. The reason they are, the facts as we know them now,
2 are unique and are extraordinary. Under 23D, we feel that as
3 punitive fiduciaries, a duty to present facts to your Honor
4 which we think effectively warn them about the dates of these
5 washers, the washer itself has a setting to put in bedding
6 material into it. Heavy linens and bedding material.

7 Buried in Samsung's website it says: Don't use the
8 bedding because they believe that those heavy objects within
9 the washer are related to the imbalanced lanes. They called it
10 imbalanced lanes, and that's what causes the damper to fall
11 apart. We feel we can marshal the facts in a reasonable
12 targeted way to come back to your Honor and say: Judge, these
13 washers can explode. People are at risk. That's the authority
14 that your Honor would have under 23D.

15 Our expert, when he looks at the washers, will be able
16 to come back to you and say: Here's the defect. Here's why
17 it's dangerous. And the idea that we've sat on our rights,
18 these washers are out there now, they're unaware of the risk
19 that they pose, and we all should be working together as
20 responsible plaintiffs lawyers to get to the heart of this
21 problem quickly. I would think that it's the defendants'
22 position that if there's nothing wrong with this, they want to
23 get it down as quickly as possible.

24 THE COURT: What kind of -- look, when we talk about
25 expedited discovery, he's right, we're usually talking about

1 something targeted, other than saying "I want discovery in this
2 case to be ten times as fast as this case", what are you
3 saying? What are you after? Is there a narrow set of things
4 that you can ask for?

5 MR. CECCHI: I don't want to concede to that. I don't
6 want it ten times as fast as we formally -- there are a narrow
7 set of items that we think we need. We put them in our brief.
8 And we're certainly willing to meet and confer with the
9 defendants to the extent we say any of these items are
10 burdensome. The principal items are technical diagrams,
11 engineering drawings. The documents related to the service
12 bulletin which they issued. They have those materials,
13 presumably. Look let's --

14 THE COURT: I thought this was aimed at a warning to
15 consumers?

16 MR. CECCHI: It is. Because we what he need to do,
17 Judge, is get it to an expert.

18 THE COURT: The only issue is, the consumers need to
19 be warned. It only matters if --

20 MR. CECCHI: We need to prove to your Honor at the
21 preliminary injunction stage that we have a likelihood of
22 success on the merits. We know these washers are exploding.
23 It's almost the thing speaks for itself services of the writer.
24 It almost speaks for itself. But we do have a responsibility
25 to warn as many as we can.

1 As your Honor has pointed out, the bond will protect
2 them against the cost, but they don't want to warn if there's
3 no reason to warn here. Twenty-three D is used in just this
4 situation, and we need to make your Honor comfortable. And we
5 need to make your Honor comfortable, if we get those targeted
6 items, he's already, we need the facts. It's not burdensome.
7 And in the extraordinary situation when consumer is standing
8 next to the washer and can get seriously injured, I can ask
9 your Honor, why not? It's the right thing to do.

10 THE COURT: Counsel, let's stop for a moment. Come
11 forward, let's talk for a second.

12 (Off-the-record discussion)

13 THE COURT: Okay, back on. Just to memorialize our
14 conference. My sense of this is that these are matters that
15 can very easily be handled in the normal Rule 16 conference in
16 front of the Magistrate. I am certain that the Magistrate will
17 see not all but some of the urgency that you identified. That
18 is, this isn't somebody who's, you know, spangles are falling
19 off the sweatshirt or something. This is something that's
20 allegedly not working properly and allegedly could be dangerous
21 to someone. They both seem to be cases of injury except for
22 perhaps the one you identified, which is, in any event, the
23 subject of litigation, or waited several years. So I am
24 certain Magistrate Judge Hammer will see some of the urgency
25 here and will not put you on an unexpedited track. And that he

1 will set reasonable deadlines so that discovery can be had in a
2 reasonable orderly fashion to put you in a position to make up
3 your mind whether you have the basis of a preliminary
4 injunction application. I'm not putting it on for a
5 preliminary injunction hearing today, I don't see a sufficient
6 basis for that. Perhaps at some point in the future, when you
7 have gotten some of this discovery, and again you're not
8 overstating your case, you've acknowledged you don't have a
9 basis today. But if and when you get your basis, you can bring
10 that motion. But farther than that, I'm not going to go.

11 Meanwhile, you should be conferring about a reasonable
12 number of products being set aside so that they can be
13 inspected in an usual order of process or discovery. I'm not
14 putting anybody in the position, as I say, I'm not -- this is
15 not going to be expoliation setup. This is going to be making
16 sure the plaintiffs have got reasonably what they need, and
17 that you defendants have set aside a reasonable number which
18 you'll arrive at in conversation of these machines because
19 experts will have to inspect them, assuming we get that far.

20 Counsel for defendants has offered to contact his
21 clients and try to work out whether there can be something
22 arranged so that in the meantime these machines don't get
23 destroyed or disappear just because they're broken and nobody
24 cares about them. Just to make sure retailers, whoever, are
25 not thoughtlessly destroying them or throwing them away in case

1 they are needed for litigation. But those two things are -- I
2 want those two things considered together, a reasonable number
3 of machines and making sure they don't inadvertently get
4 destroyed by the retailers or the people who are actually at
5 the end of the distribution chain where the machines are.

6 And the only reason I raise it is because my instinct
7 is probably these broken machines never get to Samsung. It may
8 not do the job in terms of preserving enough for this
9 litigation to go forward. Okay. So do that, report back to me
10 if you need to. Meanwhile, I will make sure that Magistrate
11 Judge Hammer has you on for a reasonable early date for a Rule
12 16. I take it a date has not been set?

13 MR. McDONALD: Your Honor, would that date follow the
14 filing of a motion to dismiss?

15 THE COURT: No, it will happen soon. And he likes to
16 have them as early as he can. I'll see that he does. And
17 finally the motion to dismiss may be one of the things on the
18 agenda at the Rule 16 conference.

19 MR. McDONALD: Your Honor, I understand we have a
20 deadline for our motion to dismiss, which is October 22nd, our
21 motion to dismiss will be filed. I wanted to make sure --

22 THE COURT: That's --

23 MR. McDONALD: I'm sorry, your Honor.

24 THE COURT: Just because that's your usual time to
25 answer.

1 MR. McDONALD: Yeah.

2 THE COURT: Yes, there is -- if that's the -- if you
3 don't need an extension on that, fine. If you don't -- if you
4 get before that, otherwise you file it. He may need to set up
5 a briefing schedule. However, maybe these motions to dismiss,
6 and these cases are sometimes quite large, but again there may
7 be another thing on the agenda for the Rule 16, for getting a
8 reasonable briefing schedule for that. Who knows. I'm just
9 spit balling. It may be that certain parts of the motion to
10 dismiss, that certain parts of the discovery might be put
11 second instead of first, I don't know. But you can talk about
12 those kinds of things.

13 MR. McDONALD: Alright. Thank you, your Honor.

14 THE COURT: Alright.

15 MR. CECCHI: Thank you, Judge.

16 THE COURT: Okay.

17 MR. LICHTMAN: Thank you, your Honor.

18 THE COURT: Thanks, everybody. I'll draft, as I sit
19 here, I have no idea what an order would look like, but I'll
20 think of something into a kick in the pants.

21 MR. CECCHI: Thank you, Judge.

22 (Matter concluded)

23

24

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